IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 824

PATHFINDER PETROLEUM COMPANY, a corporation,
*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
*Respondent.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.**

EARL GLEN WHITEHEAD,
1318 Pershing Square Building, Los Angeles 13,
*Attorney for Petitioner.*

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

## SUBJECT INDEX.

## TABLE OF AUTHORITIES CITED.

### CASES.



### STATUTES.



### TEXTBOOK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

PATHFINDER PETROLEUM COMPANY, a corporation,
*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
*Respondent.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.**

*To the Honorable Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

## Summary Statement of Matter Involved.

This is an action at law brought in the District Court of the United States, Southern District of California, Central Division, by Pathfinder Petroleum Company, petitioner herein, against General Insurance Company of America, respondent herein, to recover $37,672.21 by way of loss of profits under a use and occupancy policy issued by respondent on petitioner's oil refinery, which was damaged by fire.

## Concise Statement of the Case.

In January 1940 petitioner opened an oil refinery for the manufacture and distribution of petroleum products. It obtained from respondent a use and occupancy policy insuring against loss of profits and fixed charges and expenses resulting from the suspension of the use and occupancy of the manufacturing plant.

The policy insured against:

> "Actual Loss Sustained, by reason of such suspension, consisting of:
>
> "Item I. The net profits on the business which is thereby prevented:
>
> "Item II. Fixed charges and expenses only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, . . . all other fixed charges and expenses . . ." [R. 13-14.]

On August 31, 1940 a fire partially destroyed petitioner's plant and caused a suspension of operations for ninety days. Petitioner filed a preliminary proof of loss [R. 115] and supplement thereto [R. 117] and, after objections to alleged defects therein [R. 120], filed a 42-page document meeting these objections. [R. 65-113.] The loss claimed under Item I was $22,974.94, under Item II $14,697.27.

Under the policy the insurer was required to advise the insured of "the amount of loss, if any, the company admits on each of the different articles or properties set forth." [R. 34.] The proof of loss was, however, rejected by the insurer's peremptory statement [R. 114]:

> "The amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing.

"You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles or on each or any of the different properties set forth in said preliminary proof of loss."

Suit followed, and after issue had been joined on the questions hereinafter stated and others not available as grounds for this petition, the insurer admitted in the course of the trial that the loss sustained by petitioner under Item II of the policy *under one theory* was $5,801.25 and *under another theory* was $6,198.20. [R. 358.]

The trial court found that the net profit on the business prevented during suspension under Item I amounted to $22,974.94, and on Item II to be the sum of $7,348.63, this being one-half of the amount stated in the proof of loss.

The appeal by the insurer and a cross-appeal by petitioner resulted in a reversal on Item I, but in an affirmance on Item II of the policy.

The questions on appeal were: *First*, by what method petitioner's loss of profits should be computed; *Second*, whether, under the law of California, petitioner's proof of loss, fixed and determined the *amount of loss* sustained by petitioner where respondent failed to comply with the provisions of the policy with respect to making specific objections to the proof of loss and in failing to request an appraisal; *Third*, to what extent depreciation should be considered in arriving at petitioner's loss. The latter question resulted in disagreement of the Appellate Court, Mr. Justice Stevens being of the opinion that the trial court's determination of the issue of depreciation was supported by the evidence.

## Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment under section 240a of the Judicial Code of the United States (28 U. S. C. A., par. 347a).

The jurisdiction of the United States District Court rested on the diversity of citizenship of the parties and on the fact that the amount in controversy was in excess of $3,000 (28 U. S. C. A., Section 41).

The Circuit Court of Appeals had jurisdiction to review the judgment rendered by said District Court under 28 U. S. C. A., Section 225.

The opinion of the Circuit Court of Appeals [R. 395] was filed August 29, 1944. A timely petition for rehearing followed, which was denied on October 30, 1944. The grounds modifying and denying this petition are stated in a short opinion. [R. 413.]

## Questions Presented.

1. Is an insurer precluded under California law from disputing the *amount* of (as distinguished from the liability for) a use and occupancy loss set forth in a detailed, verified proof of loss, if its policy requires that the insured be notified of the insurer's

> "partial or total disagreement with the amount of the loss claimed . . . and . . . also . . . of the amount of loss if any the company admits on each of the different articles or properties set forth,"

where the insurer, although later admitting that under one theory of its policy the insured is entitled to $5,801.25 and under another theory to $6,198.20, merely advises the assured that

> "the amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing."

2. How under the law of California, is the actual loss of net profits prevented by a fire to be calculated; and, whatever the method, is the court entitled to single out for consideration the production costs and sales prices for the last three months before the fire where the policy provides that

> "due consideration shall be given to the experience before the fire and the probable experience thereafter."

3. Where the policy of insurance is silent on the manner in which depreciation should be treated in the event of a loss, may the Circuit Court of Appeals arbitrarily interfere with the amount of depreciation found by the trial court, at the same time refusing to allow depreciation to the insured as an item of fixed charges when the parties, in conformity with undisputed accounting practice, agree that depreciation is a proper fixed charge.

**Reasons Relied on for Allowance of the Writ.**

The writ prayed for should be allowed for the following reasons:

1. The Circuit Court of Appeals, in holding that the insurer, by denying all liability under a proof of loss without specifying the items of loss with which it disagrees in whole or in part, does not thereby preclude itself from litigating the *amount* of the loss (as distinguished from its liability under the policy), decided an important local question in conflict with applicable local law. The statutes and decisions which should have been applied are

*California Insurance Code,* Sec. 2071;

*Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin,* 50 Cal. App. 609, 195 P. 941;

*Victoria Park Co. v. Continental Ins. Co. of New York,* 39 Cal. App. 347, 178 P. 724.

2. The Circuit Court of Appeals interpreted the provisions of Item I of the policy contrary to the canon of interpretation that obtains in the State of California with respect to insurance policies.

*Civil Code,* 1654;

*Blackburn v. Home Life Ins. Co.,* 19 Cal. (2d) 226, 120 P. (2d) 31;

*Natl. Automobile Ins. Co. v. Ind. Acc. Comm.,* 11 Cal. (2d) 506, 75 P. (2d) 644.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the

Circuit Court of Appeals, for the Ninth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceeding of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10494, General Insurance Company of America, a corporation, Appellant, vs. Pathfinder Petroleum Company, a corporation, Appellee, and Pathfinder Petroleum Company, a corporation, Appellant, vs. General Insurance Company of America, a corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed; and for such further relief as to this court may seem proper.

Dated: December 15, 1944.

EARL GLEN WHITEHEAD,
*Counsel for Petitioner.*

State of California, County of Los Angeles—ss.

Earl Glenn Whitehead, being first duly sworn, deposes and says, that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

EARL GLENN WHITEHEAD.

Subscribed and sworn to before me this 15th day of December, 1944.

RALPH J. BROWN,
*Notary Public in and for the County of Los Angeles, State of California.*

My commission expires April 12, 1947.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

PATHFINDER PETROLEUM COMPANY, a corporation,
*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### A Petition for a Writ of Certiorari May be Granted Where the Circuit Court of Appeals Has Decided a Question of Local Law Contrary to the Applicable Local Statutes and Decisions.

Since the decision of the Circuit Court of Appeals is contrary to applicable local statutes and cases, a writ of certiorari should be granted.

*Rules of the Supreme Court of the United States,* Rule 38, par. 5, subd. b;

*Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Supreme Court 817, 114 A. L. R. 1487.

II.

**An Insurer Who Insists on a Detailed Proof of Loss and Who, After Receipt Thereof, Advises the Assured of its Rejection of the Proof of Loss in Terms Amounting to a Denial of Liability, Is, Under the Applicable California Decisions, Thereafter Precluded From Litigating the Amount of the Loss.**

Petitioner filed with the insurer at the latter's request extensive verified amendments to its proof of loss. [R. 65-113.] These amendments were rendered pursuant to those policy provisions [R. 33] which give the insurer the right to request that defects in the proof of loss be remedied by verified amendments.

Under the terms of the policy, the insurer, upon receiving verified amendments to the proof of loss

> "shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within 20 days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the Company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the Company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto." [Tr. p. 34.]

The only response petitioner received to its verified amendments stated:

> "The amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing." [Tr. p. 114.]

That the insurer was not sincere in this denial appears from its admissions in the course of the trial [R. 358], where the insurer's accountant, testifying of his examination of petitioner's books early in 1941 [R. 340] (that is, before suit was filed but in proximity to the insurer's denial of all liability), admitted "My computation of the fixed charges based on the eight months to August 31, 1940 was $5,801.25. Based on the three months ending August 31, 1940, $6,198.20."

Being in possession of this information, the insurer was bound to admit that amount of loss in its letter of January 9, 1941. [R. 114.] Its general denial of loss as previously quoted, in view of its knowledge that some loss had been sustained, amounted to nothing more than a denial of liability. Knowing that a loss had been sustained and by denying liability in preference to making specific objections to the proof of loss, it precluded itself from litigating the amount of the loss, and was restricted at the trial to a determination of the sole question whether it did or did not have any liability under the policy.

The contention just made is sustained by the California cases which were called to the attention of the Circuit Court of Appeals, but which were rejected by it.

(a) Specific Objections to the Proof of Loss Are Required by California Statute.

The requirement that the insurer specifically disagree with individual amounts in the proof of loss is the result of legislative policy in California. The "California Standard Form of Fire Insurance Policy" which, with appropriate riders, was adapted to the use of the insurer in issuing the policy here in question, was enacted by the California Legislature in 1909.* It is found in Deering's California Codes, Insurance Code of the State of California, par. 2071. One of its provisions contains the precise words previously quoted from the policy here under consideration. The adoption of this statute antedates the cases of *Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin*, 50 Cal. App. 609, 195 Pac. 951, and *Victoria Park Co. v. Continental Ins. Co.*, 39 Cal. App. 347, 178 Pac. 724, with which, although the two cases do not expressly mention Insurance Code, Section 2071 or its predecessor, the existing decision of the Circuit Court of Appeals is in direct conflict.

(b) Specific Objections Are Also Required by California Case Law.

Short quotations from each of the two cases will suffice to show that the present decision is contrary also to these local decisions.

In *Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin*, 50 Cal. App. 609, 195 Pac. 951, the plaintiff set forth in detail the items destroyed by fire, the cost, cash value, and the loss. Upon receipt of the proof of

---

*Cal. Statutes 1909, Chap. 267, par. 5, p. 410.

loss the defendant fire insurance company objected in the following language at page 620:

> "The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and described as 'merchandise' and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property or that you were liable by law for any loss or damage to said goods or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in the event said goods were held by you in trust at the time of the fire."

The court said, in reference to this objection:

> "The proof of loss set forth in detail the items paid by plaintiff to third parties; and if the insurance company intended to contest the amount of any particular item, it was required under the terms of the policy to specify the amount of loss it admitted on such items; otherwise it must be deemed to have assented to the *amount of the loss sustained on all items to which no specific objection was made. A general denial of all* liability would not meet the requirement of its obligation under the policy to designate the different articles for which it disclaimed liability." (Italics by counsel.)

The insurer's objection in the instant case is nothing more than a general denial and is not a specific objection to the individual items set forth in the proof of loss.

The case of *Victoria Park Co. v. Continental Insurance Co. of New York*, 39 Cal. App. at 347, 178 Pac. 724, lays down this rule:

> "The term of the policy which required the insurer to express its disagreement with the amount of the loss claimed within the specific time, otherwise it should be deemed to have assented thereto, was a binding condition of the contract. It meant exactly what it expressed or it meant nothing. It cannot be viewed in any sense as directory; the term is inapplicable to contract conditions entered into understandingly by the parties thereto which appear to be of material import as affecting the rights of the contractors."
>
> * * * * * * * *
>
> "It was put upon notice later by the service of the verified proof of loss as to what the amount of damage as asserted by plaintiff company was. At that time it should have, in keeping with the requirements of the contract of insurance, specifically announced its disagreement with the amount of the claim in whole or in part and stated particularly what amount it did admit should be paid to the insured."

If under the terms and conditions of the policy, the insurer can force the insured to set forth in detail the amount of its loss and damage, it should be required by the same token to object specifically to each item set forth

and to admit those items and amounts which its investigation discloses to be proper. Otherwise the legislative policy to provide an expeditious method for arriving at the true amount of the loss is frustrated.

When the insurer contended that the plaintiff had not sustained any loss, the only remaining question was that of liability or lack of liability under the policy. Once the trial court decided there was liability, the amount thereof was no longer subject to dispute, because the defendant in making no specific objections was deemed to have assented thereto. In *Cooley's Briefs on Insurance,* Vol. VII, page 6048, the general rule is laid down as follows:

> "Under the principle that those defects upon which the company intends to rely must be pointed out, an objection to certain defects in the proofs will amount to a waiver of all of those not mentioned."

Therefore, the petitioner was entitled to judgment under Item II of the policy in the full amount of the loss claimed, to-wit, $14,697.27.

III.

**The Requirement That Due Consideration Shall be Given to the Experience of the Insured Before the Fire Must be Construed Strictly Against the Insurer.**

It is not disputed that the policy provision providing for due consideration of the experience of the insured's business originated with the insurer. While we are in full agreement with the Circuit Court of Appeals that interpretation must be reasonable [R. 399], we do not agree that it is rational to single out the last three months prior to the fire as the period of experience to be taken into consideration but irrational to consider the full eight months since petitioner commenced operations. The drop in the sales price of gasoline was a factor to be taken into consideration. But in order to prognosticate the profits that would have been made had the fire not occurred or, in the language of the trial court, "What would have happened if nothing had happened" [R. 133] other factors and larger periods of time should have been considered.

Not being responsible for the ambiguity which undoubtedly lurks in the language of the policy, petitioner, under California law, was entitled to have this ambiguity resolved in its favor. While under California Civil Code, par. 3542, interpretation must be reasonable, it is provided in the same code, paragraph 1649:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

and paragraph 1654:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

These canons of interpretation are abundantly supported by California cases. By way of example, we quote from *Blackburn v. Home Life Ins. Co.*, 19 Cal. (2d) 226:

> "Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured (*Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421 [213 Pac. 42, 26 A. L. R. 123]; 14 Cal. Jur. 443-445)."

It is not reasonable to suppose that petitioner, when purchasing this policy, expected to lose its protection under the policy because of temporary fluctuations of the market, since as is well known, the price structure in the oil industry at the time in question was highly unstable by reason of competitive practices.

A yet graver error is apparent in the existing opinion, and in the opinion on rehearing in the treatment of the matter of depreciation. On this item there was a dissent among the judges, Mr. Justice Stevens expressing the view that the trial court's finding on the matter of depreciation should not be interfered with by the Appellate Court. Plain justice and fairness requires that since petitioner could have but did not include depreciation in its

fixed charges, it should not be charged against petitioner as an operating cost in determining net profits.

That petitioner's contention regarding depreciation is correct may be seen from the following excerpts from accounting authorities as well as from the transcript:

> "Depreciation is defined by Saliers, in his standard work on the subject, as follows:
>
> "'Interpretation by authorities.—The interpretations placed upon the word by some of those who have given thought to the subject will help one to arrive at a better conception of depreciation. One writer expresses it as "loss in value which has occurred arising from the period during which the property of the undertaking has been in service,"[8] and adds that "depreciation is, properly speaking, an operating expense and should be charged or treated as other operating expenses."[9]
>
> "'*Depreciation is in the nature of a fixed charge* rather than one varying with service.[10] The Interstate Commerce Commission has defined depreciation as "exhaustion of capacity for service," as "lessening in cost value," as "lessening in worth of physical property."[11] The Federal Trade Commission says that depreciation is the most important overhead expense.[12] An English authority employs the term "expired capital outlay" as synonymous with depreciation.[13] The Supreme Court of Missouri calls it "invisible rot." "[14] (Italics ours.)
>
> "*Depreciation, Principles and Applications,* Earl A. A. Saliers, New York, The Ronald Press, 1923.

---

"[8]Hayes, H. V. *Public Utilities: Their Cost New and Depreciation,* p. 7.

[9]*Ibid.,* p. 136.

[10]*American Economic Review*, I, p. 476. The opposite view is that depreciation should be considered as a capacity cost varying with output. Various considerations render this theoretically untenable, although it is recognized by many authorities as a practical method.

[11] *I. C. C. Valuation Docket No. 2*, pp. 48, 125, 183.

[12]*Fundamentals of a Cost System for Manufacturers*, July 1, 1916, p. 12.

[13]Leake, P. D., *Depreciation and Wasting Assets* (1917), p. 202.

[14]*Home Telephone Co. v. City of Carthage*, 235 Mo. 644."

"Any accountant familiar with the technical literature will readily state that this treatise is the standard authority on the subject.

"The correctness of the foregoing principle that *depreciation becomes a part of the fixed charges* was conceded by the accountant for the defendant insurance company. We quote from his testimony as follows:

" 'Q. What do the eight months show? A. The eight months showed a net profit of $26,194.25.

'Q. And that was after taking out how much depreciation? A. $23,079.59.

'Q. When you take an item of $23,000.00 depreciation out of the gross profits of the company, *doesn't that* [195] $23,000.00 *in your opinion become a part of the fixed overhead of the company?* A. *Yes, I believe that it would.*

'Q. Have you taken that $23,000.00 into consideration in comparing the figures which you have given to this court? A. No, sir, I haven't.' " [Tr. pp. 368-369.] (Italics ours.)

"This admission is in accord with universal accounting practice. A most recent authority on the subject, expressing the same view, is W. B. Lawrence, *Cost Accounting*, Prentice-Hall, 1944, 9. 181."

## Conclusion.

We respectfully urge that this petition be granted and that the Circuit Court of Appeals be directed to adopt the applicable California decisions as well as sound accounting practices in giving petitioner the relief to which it is entitled under the policy.

Respectfully submitted,

EARL GLEN WHITEHEAD,
*Attorney for Petitioner.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1944.

_____

_____

12-14-44—60

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 824

PATHFINDER PETROLEUM COMPANY, a corporation,

*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

*Respondent.*

**Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

WALTER O. SCHELL,
1212 Bartlett Building, Los Angeles 14, California,
*Attorney for Defendant and Respondent.*

GERALD F. H. DELAMER,
*Of Counsel.*

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

## SUBJECT INDEX.

## TABLE OF AUTHORITIES CITED

### CASES.



### STATUTES.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 845.

PATHFINDER PETROLEUM COMPANY, a corporation,
*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
*Respondent.*

## Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*To the Honorable Harlan F. Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States, Respondent Respectfully Shows:*

## I.
## Statement of Facts.

### (a) GENERAL.

Petitioner was engaged in the business of both manufacturing and selling gasoline and of purchasing and reselling gasoline. Its first month of full operation was January, 1940 [R. 195, 207, 223]. After this month, its cost of production of the gasoline it manufactured remained practically constant [R. 68, 175].

Respondent introduced in evidence as its Exhibits "B," "C" and "D" [R. 125-127, 343, 346, 347], certain graphs illustrating the prices received by petitioner and its profits or losses. These were constructed from the figures furnished by petitioner's own auditor-witness [R. 68, 258-261, 273-274, 344-345].

Exhibit "B" shows that prices rose steadily for the first five months of the year; that they dropped in June to below the January level and that they continued downward in July and August.

Exhibit "C" shows the fluctuations in profits or loss, with and without depreciation being taken into consideration.

Exhibit "D" shows a comparison of the prices received by petitioner with its profits or losses. It shows that the latter varied almost directly with the former.

On August 31st the fire occurred causing a three month suspension of petitioner's manufacturing business (Petition, p. 2).

Exhibit "B" shows that a slight rise in prices occurred in September and October over those of August but that they did not reach the July level. November was the lowest month of the entire year. In December, that is the month following the suspension period, prices again rose very slightly over the November prices but did not reach those of September or October.

The average prices for these periods were as follows:

| | |
|---|---|
| First 5 months | 6.787¢ per gal. |
| June, July and August | 6.203¢ " " |
| Suspension period (Sept., Oct. & Nov.) | 6.084¢ " " |
| December | 6.033¢ " " |

Respondent's policy was not a fire insurance policy covering damage caused by fire. Petitioner had such a policy in another company which paid the fire loss [R. 215]. Respondent's policy did not cover any loss sustained by plaintiff as the result of the fire, excepting in so far as such loss consisted of net profits and certain fixed charges and expenses which plaintiff *would have earned had it not been for the fire.*

Petitioner contends that the average monthly profit for the *entire* first eight months established what would have been its probable experience during the suspension period, being the next three months.

The trial court held in accordance with petitioner's contention. The Circuit Court of Appeals reversed the trial court on the ground that, since petitioner's own experience showed that profits varied directly as did prices received, the profits made by petitioner while high prices for its product were prevailing did not establish that it would have made like profits during a period of much lower prices.

(b) Depreciation.

Petitioner's president testified on direct examination that petitioner had used the item of $3,034.99 as depreciation in its Proof of Loss because "we felt that that represented the true depreciation for the first eight months" [R. 208-209]. On cross-examination, however, both this witness and petitioner's auditor testified that the depreciation shown upon petitioner's books and used in their income tax returns, amounted to $23,079.59 for the eight months and that this figure was arrived at by taking into consideration the cost of acquisition of the plant and its equipment and the probable useful life thereof [R. 218, 273-274, 299-303].

The trial court adopted as the depreciation the figure of $3,034.99. The Circuit Court of Appeals held this to be error in view of the facts developed upon the cross-examination of petitioner's two witnesses.

(c) Proof of Loss and Appraisement.

Following the fire petitioner furnished respondents with a corrected Proof of Loss [R. 61-113]. Respondents served upon petitioner a notice of disagreement [R. 114-115]. Both the trial court and the Circuit Court of Appeals held that this notice was sufficient to put in issue the amount of the loss.

Respondents did not demand an appraisement. Both the trial court and the Circuit Court of Appeals held that its failure so to do did not *ipso facto* entitle petitioner to recover the full amount claimed in its Proof of Loss.

## II.

## Statement of the Case Contained in the Petition.

The statement of the case as contained in the petition is highly inaccurate in many particulars.

Petitioner states that respondents admitted during the course of the trial that the loss sustained under Item II of the policy [R. 13-14] was either $5,801.25 or $6,-198.20. This is not the fact. Respondents' witness, Maloney, testified that petitioner's books showed fixed charges and expenses continuing during the suspension period to be either of these sums. That is very different from an admission that the books were correct or that either of these sums constituted a loss under Item II of the policy. The policy provided that certain fixed charges and ex-

penses were recoverable but "only to the extent that they would have been earned had no fire occurred" [p. 2 of Petition; R. 13-14]. It is and always has been respondents' contention that even were petitioner's books correct, these fixed charges and expenses would not have been earned by petitioner even had no fire occurred, and that consequently they did not constitute a loss within the policy provisions. (*Goetz v. Hartford Fire Ins. Co.*, 193 Wis. 638, 215 N. W. 440, 441.)

Petitioner says the first question on appeal was: By what method petitioner's loss of profits should be computed? The actual question was whether under any reasonable method of computation the award of the trial court should be affirmed.

Petitioner says the second question on appeal was: Where a respondent fails to comply with the provisions of the policy with respect to making specific objections of the Proof of Loss, and in failing to request an appraisal, was amount of petitioner's loss fixed by petitioner's Proof of Loss? The actual question was whether the evidence was sufficient to support the decision of the trial court that respondents had not failed to comply with the requirements of the policy so as to debar itself from contesting the amount claimed in the Proof of Loss.

Petitioner says the third question on appeal was: To what extent depreciation should be considered in arriving at petitioner's loss? The actual question was whether the amount allowed by the trial court on account of depreciation was supported by the evidence.

## III.
## Questions Presented.

Under this heading in the petition, we find further inaccurate statements.

On page 5 of the petition the statement is repeated that respondent admitted that petitioner was entitled to either of two sums mentioned. As we have just shown, this is not a fact.

On the same page, petitioner says that the Circuit Court of Appeals singled out for consideration the production costs and sales prices for the last three months before the fire. That court did not "single out" these particular figures. In its opinion it sets forth the figures for the entire eight months of petitioner's operation before the fire and the prices prevailing during the succeeding three months, namely, the suspension period. Having done so to illustrate its decision, that court held that the profits made by petitioner before the break in the market were not determinative in estimating the profits it would have made after that break and during a period when the much lower prices caused by the break were still prevailing.

On page 5 petitioner says, that the Circuit Court of Appeals arbitrarily interfered with the amount of depreciation found by the trial court. This is not so. It held that testimony as to what "we felt" when preparing the proof of loss did not overcome the facts as developed on cross-examination of the same witness and of petitioner's own auditor and witness.

Again, the Circuit Court of Appeals did not "arbitrarily refuse to allow" depreciation as an item of fixed charges

and respondent has never agreed that depreciation is a recoverable fixed charge in this case. It has always been respondent's claim that where a plant has been destroyed by fire and restored by an insurance company, as was done in this case [R. 215], there is no depreciation during the time of such restoration. (*Fidelity-Phoenix Insurance Co. v. Benedict Coal Corporation* (C. C. A. 4), 64 Fed. (2d) 347, at p. 353.)

This is very much borne out by Petitioner's own books which show an average monthly depreciation as follows: Before the fire $2,284.95, after the fire $117.22 [R. 273-274].

Moreover, the Circuit Court of Appeals held that since petitioner never made any claim before the trial court that depreciation should be included in its fixed charges and expenses and, in fact, never made any such claim on appeal until its petition for rehearing, petitioner must be deemed to have waived this claim, even had the claim any validity.

## IV.

## Reasons Relied Upon by Petitioner for Allowance of Writ.

Petitioner states on pages 6-7 of its petition, that the Circuit Court of Appeals decided an important question of local law in conflict with the applicable local law. From the cases cited by petitioner, it apparently is referring to a question dealing with the Notice of Disagreement. In fact, that court decided no question of law whatever on this point, whether in conformity with local law or not.

It decided that the evidence supported the decision of the trial court that respondents' Notice of Disagreement with petitioner's proof of loss did, in fact, constitute a "disagreement in whole" with the amount claimed by petitioner and not a mere general denial of liability. This point will be considered more at length in reply to petitioner's brief in support of its petition.

Petitioner says, page 6, that the Circuit Court of Appeals interpreted the provisions of Item I of the policy contrary to the canons of interpretation that obtain in this State with respect to insurance policies. From the authorities cited by petitioner, this canon appears to be that an insurance policy should be construed against the insurer.

The Circuit Court of Appeals merely held that the evidence failed to show that petitioner by reason of the fire sustained a *loss of profits* amounting to $22,974.94 and which it otherwise would have made. It did not construe the policy, except to hold that the phrase "due consideration shall be given to the experience of the business before the fire and the probable experience thereafter," did not mean, under the facts of this case, that petitioner's average profits for the entire period of its operation before the fire was the controlling basis of estimating its probable experience during the suspension period. The facts referred to are that the greater part of such prior experience occurred during a period of high prices while the suspension period occurred during a period of low prices.

## V.

## The Notice of Disagreement.

### (a) Good Faith.

Under Heading II of its brief on the petition, it is said, page 11, that when it filed its Notice of Disagreement, respondent was not sincere in its denial that petitioner sustained any loss under Item II of the policy. Petitioner intimates that, because of the audit it caused to be made of petitioner's books, respondent knew of petitioner's fixed charges and expenses. There are, at least, three answers to this contention. First: Before filing its Notice of Disagreement, respondents knew that, owing to the break in gasoline prices, petitioner could not have operated during the suspension period except at a loss and consequently would not have been earned its fixed charges and expenses. Second: The audit made by respondent did not take place until after the Notice of Disagreement had actually been given and until after the time for the giving thereof had expired. Third: Respondent is not bound by petitioner's books and, in fact, contended strenuously on the trial that they did not reflect the true fixed charges and expenses [R. 277-281, 285-299, 305-308, 334-336].

The Notice of Disagreement was given in perfect good faith and in conformity with respondents' consistently maintained position.

### (b) Sufficiency.

Petitioner contends the Notice of Disagreement was insufficient.

The cardinal fallacy in petitioner's position on this point lies in its failure to distinguish between a mere

*general denial of liability* and a disagreement with the amount of loss claimed.

If an insurer upon receipt of a proof of loss merely denies liability upon the policy, it may be that it should be deemed to have admitted the amount of loss, if there was liability. Likewise, if an insurer merely disagrees with the amount of loss, it might be deemed to have admitted liability for such loss as was sustained.

Thus, if respondent had merely denied liability on the ground, for instance, that the fire was deliberately caused by the insured or was not on insured premises, then, on proof that the fire was not caused by the insured or was on insured premises, respondent might not have been in a position to deny the claimed amount of the loss. In the present case, however, respondent never has denied liability, that is, that its policy was applicable to the fire. It does, however, claim that, because of peculiar circumstances, that fire occasioned no loss covered by the policy. Its Notice of Disagreement was not a denial of liability but a notice that it disagreed in whole with the amount of loss claimed and that it admitted no loss in connection therewith. It waived any claim that the policy was not applicable to the fire. It definitely asserted its claim that the fire occasioned no loss covered by the policy.

Turning now to the provision headed, "Ascertainment of Amount of Loss" [R. 34], we find that this requires the company to notify the insured in writing of its partial or total disagreement with the amount of loss claimed by the insured. This the respondents did do, the notification reading [R. 114]:

> "You are hereby notified the undersigned totally disagrees with the amount of loss claimed by you in said Preliminary Proof of Loss . . ."

It is to be noted that neither in the petition nor the brief is any reference made to this part of the Notice of Disagreement.

The Notice of Disagreement given by the respondents fully complies with the requirement of the policy, further reading as it does [R. 114]:

> "You are hereby notified . . . the amount of loss which this company admits on each or all of the items described in said preliminary proof of loss is nothing.
>
> You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles, or on each or any of the different properties set forth in said preliminary proof of loss."

We fail to see how any notification could have more clearly notified the assured that the amount of loss which respondents admitted on each of the different articles or properties was nothing and that it would not admit any loss on any of the different articles or properties.

In this connection we would call the court's attention to certain of the maxims of jurisprudence as set forth in the California Civil Code as follows: *Civil Code* 3528: "The law respects form less than substance." *Civil Code* 3532): "The law neither does nor requires idle acts." *Civil Code* 3542: "Interpretation must be reasonable."

We, therefore, submit that respondents have fully and completely complied with both the letter and the spirit of said policy provisions and that the petitioner was fully and clearly notified of the attitude of the company, namely, that it admitted no loss whatsoever coming under the terms of the policy.

Petitioner cites, p. 14, *Victoria Park Co. v. Continental Ins. Co.*, 39 Cal. App. 347, 178 Pac. 724. This case involved the destruction of property by fire. The proof of loss was not excepted to by the insurer, except that ten days after its receipt a letter was written plaintiff stating:

> "According to your documents we are criticising Section 'C' and we are also criticising the elimination of the date of the fire."

The Court held that the statement, "According to your documents we are criticising section 'C' and we are also criticising the elimination of the date of the fire," did not express any disagreement with the *amount* stated by the insured, either as to the whole or any part thereof. We cannot see how this case has any analogy to the present case, as obviously a statement "we are criticising section 'C'" is in no wise the equivalent of a statement of the amount of loss admitted on that item, or that no amount was admitted thereon.

In fact, the opinion of the court strongly implies that, no matter how inaptly worded, a notice informing the insured of the amount of loss admitted or that no loss whatsoever was admitted, would have been sufficient.

Plaintiff cites, page 12, *Lauman v. The Concordia Fire Ins. Co.*, 50 Cal. App. 609, 195 Pac. 951. This case again involved the destruction of specific property by a fire. The letter of disagreement merely stated that the company disagreed with the proof of loss because it failed to show any interest of the insured in the property damaged. This is entirely consistent with the company admitting that the *amount* of loss caused by the fire was exactly as claimed in the proofs.

This is particularly emphasized by the express statement of the court itself on page 620 as follows:

> "No objection is made in the letter to the amount of any loss, but it is based solely on the reason stated."

The court then points out that proof was made that the plaintiff had assumed liability for the goods destroyed and that no contention was made that the evidence was not sufficient to support the court's finding to that effect. Thus, the plaintiff fully met the only objection raised by respondents' letter of disagreement and, therefore, was obviously entitled to recovery.

The present case is exactly the reverse of the *Lauman* case. In the *Lauman* case there was a denial of any liability but no disagreement with the amount of loss claimed. In the present case there is no denial of liability, but there is a total disagreement with the amount of loss claimed and a statement that the amount of loss admitted on each item was nothing.

We submit that the *Lauman* case is not authority for the contentions of petitioner, but is strong inferential authority for the position of respondents, since the opening part of the letter of disagreement in the *Lauman* case is much less specific than is the letter involved in the present case, and yet in the *Lauman* case the letter itself was not held to be insufficient, but was merely held to limit the right of the respondents to rely upon the specific objections therein set forth.

The court held that *having limited its disagreement* with the claimed loss to certain specific reasons, the defendant therein had to stand or fall upon those reasons.

It is true that in this case the court, in *dictum,* says:

> "The general denial of all liability would not meet the requirements of its (insurer's) obligation under the policy to designate the different articles for which it disclaimed liability. *Victoria Park Co. v. Continental Ins. Co.,* 50 Cal. App. 609, 195 Pac. 951.)"

The *Victoria Park Company* case, which we have just discussed, certainly does not support this statement since in it, as we have seen, there was no denial of liability, but merely a statement that a certain item was "criticised." The *Lauman* case itself merely holds that when a denial of *liability* is specifically placed upon certain specific grounds then *liability* on the policy cannot be avoided on other and different grounds. Even in the quoted *dictum* the court does not say that a general disagreement with the *amount* of loss claimed in a proof of loss or a general statement that the insurer does not admit any loss on any of the items is insufficient. The intimation in both cases is that such a general statement, if made without limiting qualification, is in fact sufficient.

We submit, however, that the Notice of Disagreement given by the defendant in the present case is not a mere notice of general disagreement, but is as specific as it can be made by the English language. We will repeat the wording of the Notice of Disagreement, adding italics:

> "You are hereby notified the amount of loss which the company admits *on each or all* of the items specified in said preliminary proof of loss is *nothing.*
>
> * * * You are further notified that the undersigned *does not admit* that you suffered *any loss on each or any* of the different articles or on *each or any* of the different properties set forth in said preliminary proof of loss." (Italics added.)

## VI.

## Failure to Request an Appraisal.

While this point is mentioned in the petition, it is not referred to in the brief in support thereof. Probably it must, therefore, be deemed waived. However, we will briefly discuss it.

It is true that the policy provides that if the parties fail to agree upon the amount of loss, the company shall demand in writing an appraisement. However, the policy does not set forth any penalty to be incurred by the company for failure so to do, except that such appraisement ceases to be a condition precedent to the bringing of suit by the insured[Tr. p. 35]. There is no provision whatever in the policy that a failure to demand the appraisement will establish the loss as the amount claimed in the proof of loss or will deprive the company of any defense it would otherwise have, except that of petitioner's suit being premature. On the other hand the policy expressly provides [Tr. p. 35]:

> "If for any reason not attributable to the assured . . . appraisement is not had . . . the insured . . . may prove the amount of his loss in an action brought without such appraisement."

If the failure of the company to request an appraisement conclusively established the amount of the assured's loss, there would be no necessity for the assured to prove such loss in an action on the policy.

Petitioner has cited no authority in support of its contention. None such exists. On the other hand, the authorities cited by the Circuit Court of Appeals definitely hold that a failure to demand an appraisal under such a policy does not prevent the insurer from contesting the amount of loss claimed by the insured.

## VII.
## Loss of Profits.

Petitioner says, page 16 of its brief, "not being responsible for the ambiguity which undoubtedly lurks in the language of the policy . . ." There is no ambiguity in the policy and petitioner does not even attempt to point out any claimed ambiguity. In fact the Circuit Court of Appeals refers to the policy as "clear and direct in its terms." For the first five months of Petitioner's operation, prices rose and so did its profits. Then came the break in the market. Prices then dropped for three months and so did petitioner's profits, until in August they were negligible, even without a deduction for depreciation. They resulted in a substantial loss if depreciation is considered [R. 68, 274, 345]. Production costs remained practically constant. Then came the fire. During the three months suspension period following the fire, prices were even lower than for the three months immediately preceding it.

Under these circumstances the Circuit Court of Appeals held that the profits made before the break in the market were not determinative of the profits that would have been made after the break and while the much lower prices were still prevailing.

We submit that the decision of the Circuit Court of Appeals is so obviously correct that no further elaboration of the point is required.

## VIII.
## Depreciation.

Petitioner's argument on this point is quite in keeping of the remainder of its argument.

With reference to depreciation for the eight months before the fire, which would *decrease* its profits, petitioner refers to the testimony of its president that "We felt that $3,034.93 would represent the depreciation" for those eight months. Petitioner's books show that it charged off $23,079.59 for depreciation for these eight months [R. 272-273].

With reference to the claim for depreciation on the same property after the fire had partially destroyed it and which petitioner claims would *increase* the amount coming to it under Item II of the policy, petitioner claims that the depreciation for those same eight months had been $23,079.59 and, apparently, contends that the same depreciation would continue during the suspension period (Brief p. 19). Petitioner's books show it charged off for depreciation for the entire three months of the suspension period, the total sum of $356.66.

Before the fire, Petitioner contends the depreciation was very small, while its own books show it to have been large. After the fire Petitioner contends the depreciation was large (in fact much larger than before the fire) while its books show it to have been almost negligible.

We have already considered in Subdivision I(b) of this brief, the actual holdings of the Circuit Court of Appeals

with reference to depreciation and its reasons therefor. To save needless repetition we will respectfully refer this court to that portion of this brief in answer to the concluding pages of respondents' brief.

WHEREFORE, it is respectfully submitted that the Circuit Court of Appeals decided no novel or important question of law, whether in conformity or not, with local law, but merely passed on the sufficiency of the evidence to sustain certain conclusions made by the trial court; that no reason exists why the present petition for Writ of Certiorari should be granted; and that said petition should be denied.

Respectfully submitted,

WALTER O. SCHELL,
*Attorney for Defendant and Respondent.*

GERALD F. H. DELAMER,
*Of Counsel.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of January, A. D. 1945.

_____

_____

1-25-45—60